

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1243
77-1285

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1243
Docket No. 77-1285

UNITED STATES OF AMERICA,

Appellee

—against—

WILLIAM H. HOCKRIDGE, CHARLES PETRI
AND STEPHEN K. EASTON,

Defendants-Appellants,

—and—

GEORGE FLYNN AND GEORGE WHITNEY,

Defendants.

REPLY BRIEF FOR DEFENDANT-APPELLANT
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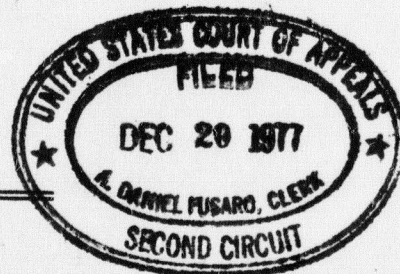


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REPLY BRIEF FOR DEFENDANT-
APPELLANT STEPHEN K. EASTON

PRELIMINARY STATEMENT

This brief is submitted on behalf of defendant-appellant Stephen K. Easton ("Easton") in reply to the submission of the appellee United States of America ("appellee" and "the government") and in response to certain questions raised by the Court during oral argument of the appeal.

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PRELIMINARY STATEMENT

This brief is submitted on behalf of defendant-appellant Stephen K. Easton ("Easton") in reply to the submission of the appellee United States of America ("appellee" and "the government") and in response to certain questions raised by the Court during oral argument of the appeal.

SUMMARY OF ARGUMENT

1. Under United States v. Gullia, 450 F.2d 777 (3rd Cir. 1971), which appellee does not ever distinguish, reversal of the judgment below is mandated by the fact of the Trial Court's having privately interviewed and instructed two jurors.

2. Further, the effect of the interview, as factually demonstrated below, was so coercive of a subsequent verdict as to require reversal of the Count Two conviction.

3. Finally, Rule 606(b) of the Federal Rules of Evidence is inapplicable to a pre-discharge statement by a juror, and, even if applicable pre-discharge, Rule 606(b) is not inflexible under the decisions of the United States Supreme Court and this Court and should not be applied at bar.

REPLY STATEMENT OF FACTS

A. The Court's Private Interviews With The Jurors.

As this Court is aware, the Trial Judge twice conducted in camera interviews with jurors in this litigation. On the fifth day of trial, the Court interviewed all of the jurors and alternates after learning that the jury had been improperly discussing the case during recesses and that several jurors had expressed the pre-conceived opinion that the defendants were guilty. As indicated in Easton's prior submission (pp. 9-11), the in camera interviews were perfunctory and conducted in such a manner as to discourage, rather than encourage, the jurors to reveal the extent and nature of statements of bias.*

* The government relies upon the statements of several jurors that the expressions concerning defendants' guilt which they heard were made in jest. However, these exculpatory juror statements must be read in light of the Trial Judge's admonition to each juror, at the outset of the interviews, that the jury was under an obligation not to discuss or decide the case prior to the close of the testimony (T. 688-722). Given that reminder, it would have required a remarkable juror indeed to state that the Court's instructions had been breached. Additionally, not all of the jurors felt the statements concerning guilt to have been unintended. Finally, we resist appellee's claims that the interviews were extensive. Typically, each interview covers only two to three pages of the transcript. The interviews of all twelve jurors and four alternates occupies only pages 688-722 of the transcript.

It is Easton's position, as indicated in his prior submission (pp. 41-2), that the Trial Judge's refusal to declare a mistrial in the face of the jurors' expressed preconceived notions of guilt itself constitutes reversible error.

The government's presentation of the facts concerning the evidence of further misconduct occurring during the jury deliberations is disingenuous in several respects. First, appellee indicates that no objection was taken to the decision of the Court, at appellee's urging (T. 5900),* to solicit a partial verdict from the jury following its second day of deliberations (Br. p. 22). The statement is

* References herein preceded by the designation "T." are to the transcript of proceedings below. References preceded by the designation "A." are to Easton's Appendix.

On the evening of the first day of deliberations in this 34 day trial, the Court announced its decision to ask for a partial verdict, pursuant to the government's request and over objection, but never in fact made a formal inquiry (T. 5877-8). The later request for a partial verdict by the Judge was made notwithstanding his expressed recognition that the jury had not completed deliberations on the conspiracy count (T. 5900) and the decision to request such verdict was announced immediately prior to the entry of the jury into the Courtroom (T. 5900).

simply inaccurate (see T. 5900, where the objection appears). Secondly, appellee implies that the request for a jury poll was untimely (Br. pp. 22-23). Again, the transcript reveals the request was made by counsel for the lead defendant promptly after the jury announced the verdict (T. 5902).*

More importantly, appellee mischaracterizes the substance of the subsequent events. As this Court is now aware, the first partial verdict was rendered at approximately 6:30 p.m. on February 14, 1976 (T. 5902). The following day the Court received, and ignored, the note from Juror Four. On the morning of February 16, the Court received Juror Three's note and determined to interview the two jurors together, although Juror Four's note did not reveal her reason for desiring an interview, in order to "salvage" the partial verdict (A. 57-68).

Appellee omits to state the significant fact that during that interview the Court studiously precluded Jurors

* The fact that no request for a poll as to each defendant was made cannot be deemed to foreclose appellate review of the polling procedure, in view of the magnitude of the error. See, Johnson v. United States, 318 U.S. 189, 200 (1943).

Three and Four from describing the jury misconduct which had occurred. When Juror Four attempted to specify the nature of the attack, the Court abruptly cut her off with language indicating the jury misconduct was routine (A. 80-81). The Judge indicated to Juror Three similarly that her comments and concerns were insubstantial, stating:

"Well, now, Miss Bruno, I think these things are difficult and you have had sort of an emotional problem with this thing here, haven't you?" (A. 82)

Indeed, it is quite possible that threats were made to the dissenting jurors. We will never know, because the Trial Court frustrated the jurors' attempts to detail the incredible, personal attacks made upon them.*

Similarly, the Court's attitude must have conveyed to the two dissenters his unconcern with the gravity of their allegations. The Court not only refused to hear the details of the attack on the jurors, but also in effect told Juror Three that her reasonable doubts were merely an "emotional problem". Indeed, the Court made light of Juror Three's vital statement that she had surrendered her conscientious conviction of Easton's innocence:

* Juror Four stated: "I was personally attacked incredibly" (A. 80).

COURT: . . . You know, I mentioned
when I charged you I don't want
er to surrender your honest convic-
tions because of other jurors.

"JUROR NO. 3: That is what I did.

"THE COURT: You think you did."
(emphasis added) (A. 82)*

The obviously coercive impact of this off-handed treatment of the jurors' sentiments, coupled with the Judge's mandate that the two jurors rejoin the jury to deliberate is discussed below.

Similarly, appellee clearly misapprehends the impact of the Judge's instruction to the two jurors to redeliberate concerning Count One. The government's brief disingenuously states:

* It was Easton alone with whom the jurors were particularly concerned. Juror Four indicated that by February 14 she was "secure" in the guilty verdict as to Hockridge and Petri (A. 81). With respect to Easton, she stated that three or four jurors entertained doubts and were "railroaded" by the majority (A. 81-2).

At first, the Court refused even to let Juror Three speak concerning Easton, whom she similarly dealt with apart from Hockridge and Petri (A. 79-80). At the close of the interview she too specifically stated that Easton had not been given "a fair shake" (A. 85).

"At no time after this colloquy between Judge Bonsal and the two jurors did any juror in any way suggest that he or she had any doubts about the previously entered guilty verdict on Count One . . . " (Br. p. 24).

This is unremarkable, as Judge Bonsal had promised to speak with Jurors Three and Four again and had also indicated to them that they could, with the other jurors, re-deliberate as to Count One (A. 84-85).*

Under the circumstances, the jurors were led to expect both that they would be asked about the Count One verdict and again and that they would have a further opportunity to speak with the Court concerning that verdict. In fact, the jury was precipitously discharged after rendition of its fifth

* Judge Bonsal stated:

"After the jury finishes, I think I will want to see you again and talk again about some of these things . . .

"When you go back with the jury and when you think it is an appropriate time, you raise your points again with the jury about what you think about what they have done and see what they think about that and have an exchange about that" (A. 84-5).

partial verdict (T. 5955, 5968-70, 6021, 6022-3), and prior to having reached any verdict on eleven counts of the Indictment (A. 3). The Court never met with Jurors Three and Four again, as promised; the jury as a whole was never instructed to redeliberate as to Easton on Count One; the jury was never polled again on Count One; Jurors Three and Four were never permitted to alter their verdict.

B. Easton's Alleged Promi-
nence In The Conspiracy.

Apparently recognizing again, as during the closing arguments,* the infirmities in the case against Easton, the government in its brief attempts to paint Easton as a central party to and participant in the alleged conspiracy, and in so doing takes undue liberty with the record.

The government asserts that shortly after Petri's conception of the "'get rich quick' scheme", Easton was apprised of the plan by Petri and agreed to become accountant for "Petri's mini-conglomerate" and to receive a salary and a substantial stock interest in the parent company (Appellee's Brief, p. 6). This concept is inaccurate in several respects. First, it was Fillet, the highly paid financial consultant to Petri, who explained the workings of Zavala-Riss to Easton. Fillet did not reveal to Easton at the time any scheme to defraud lending institutions. Secondly,

* During the closing arguments, of the one hundred and thirty-five pages devoted to discussion of the individual defendants, one hundred were focused upon Easton alone (T. 5345-5441, 5304-6, 5316-9, 5333-4).

Fillet, himself a government witness promised immunity, testified that Easton was but a part-time employee, offered only a "modest salary" (T. 1565, 1583-7). Finally, virtually all of Petri's employees were promised stock; the government cites to no record support indicating that Easton received any promised securities.*

Of equal inaccuracy is the government's repeated reference to various employees of the Petri companies as in fact "employees of Petri and Easton"**, a phrase intended to imply that Easton both knew of Petri's fraudulent scheme and knowingly aided in its effectuation.*** In fact, not less than seven government witnesses who had been employed by one or more of the companies listed only Petri and Flynn

* Indeed, the pages of the transcript cited by the government do not support the statements appearing in its brief.

** See, e.g., Br. p. 9, where this mode of reference appears three times.

*** Inter alia, the government states that Petri and Easton persuaded "their" employees to sign the various notes, omitting to mention that Easton himself was duped by Petri into becoming signatory to and guarantor of various obligations (T. 4723-6).

as their "bosses" (Burke, T. 1205; Lodge, T. 1316; Williams, T. 1384; Gelertner, T. 1485-6; Fernandez, T. 1437; Zavala, T. 2126-7, 2122-3; Whitney, T. 3113-5, 3044, 3058). One secretary testified Easton "didn't seem to know what was going on" (T. 1325). Other co-workers described Easton as Petri's "pawn" (T. 1538) and "naive" (T. 2657).*

Similarly unsupported by the government's citation to the record is the allegation that Easton told Fillet he was unconcerned about preparing inaccurate financial statements because he was not signing such statements (Br. p. 9). The portion of the record to which appellee refers states only that Easton told Fillet he had not signed the statements and makes no reference to the identity of the author.** Indeed it is precisely because the numerous

* Similarly the allegation that Easton had knowledge of and participated in "pay-offs" to Hockridge is entirely without record support. The Court is respectfully referred to T. 2018-20, 2805-19, 2903-6, relied upon by appellee.

** The government similarly seeks to support the inference that Easton knowingly and grossly inflated the worth of Today Store Services by citation to the transcript at T. 1440-50. Those pages relate only to Petri's costs in acquiring the company.

financial statements admitted into evidence were never authenticated that Easton has argued that their reception over his objection on point (T. 740-1) was error (see Easton's prior submission, pp. 57-58).

LEGAL ARGUMENT

POINT I.

UNDER GULLIA, THE PRIVATE
INSTRUCTION OF THE JURORS
WAS ERROR.

Easton's prior submission (pp. 29-31) discusses at length the reasoned decision of the Third Circuit in United States v. Gullia, 450 F.2d 777 (3rd Cir. 1971), in which the Court reversed because the Trial Judge privately interviewed and instructed a dissenting juror, after return of a sealed verdict. Appellee wholly omits to discuss the Gullia decision, which Easton contends is dispositive.

At bar, during his interview with Jurors Three and Four, the Trial Judge positively instructed those jurors to redeliberate with respect to Easton's guilt on the conspiracy count, much as in Gullia the Judge instructed the dissenter to redeliberate respecting the sealed verdict and repeated the instruction previously given concerning the meaning of aiding and abetting.* Unlike Gullia, the Court

* No objection was made in Gullia to the substance of the instruction.

at bar never instructed the jury as a whole to redeliberate,* thus further confusing, and, as discussed below, coercing, the dissenters. As in Gullia, this Court must reverse based upon the Court's improper meeting with and instruction of the two jurors. See also, United States v. Rabb, 45 F.2d 343 (3rd Cir. 1971), cert. denied, 405 U.S. 995 (1972), and Beaty v. United States, 213 F.2d 712 (4th Cir. 1954), vacated and remanded on other grounds, 348 U.S. 905 (1955).

* In Gullia the instruction to the jury included the protective reminder that dissenting jurors need not be guided by the majority.

POINT II

THE COUNT TWO CONVICTION MUST
BE REVERSED BECAUSE OF THE CO-
ERCIVE IMPACT OF THE COURT'S
INTERVIEW AND INSTRUCTION

Easton has previously set forth legal authority for the proposition that the giving of an Allen-type charge at a time when the Court is aware of the numerical split of the jury, as here, and the jury is aware of the Court's knowledge is a "precarious undertaking" because the effect is "unavoidably to add the judge's influence to the side of the majority". United States v. Robinson, 544 F.2d 611, 620 n. 14, (2nd Cir. 1976). (See Easton Br. pp. 33-36). That authority is undenied by appellee.

There can be little doubt that the Judge's comments and conduct at bar were in fact coercive, albeit in a subtle manner. First, the Judge repeatedly indicated that the two jurors' expressed reasonable doubts were in fact only "emotional" problems, and that Juror Three only thought she had surrendered her honest conviction. In so doing, he belittled the intelligence and challenged the

emotional stability of the jurors.*

Not only did the Court's comments call into doubt the two jurors' motivation and imply that their concerns were insignificant, but also the direction that the jurors return to deliberate further, coupled with the absence of any salutary instruction to the jury at large to give due deference to the dissenters' opinions, must have given rise within the jury deliberations to a sense that the abusive jurors could continue their misconduct unbridled and that they could continue, with impunity, to

* In United States v. Thomas, 449 F.2d 1177, 1182-3 (D.C. Cir. 1971), in which the Circuit Court abandoned prospectively the use of the Allen charge, the Court wrote:

"'No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence, or his integrity.'"

There can be little question that where the Trial Judge, whom jurors naturally regard with particular respect, regards such jurors' inability to decide as merely an "emotional problem", the effect is even more coercive than the situation envisioned in Thomas.

"railroad" the other jurors. The dissenters, at the same time, may either have felt their own opinions and concerns to be meritless or they may have assumed that in each instance their remedy must await the promised further interview with the Court.

Indeed, the rendering of a guilty verdict on Count Two so soon after the Judge's interviews bears eloquent witness to the coercive effect of that interview. The interview commenced during the morning of February 16, 1976. Following its conclusion and at 2:30 p.m., the jury rendered its partial verdict with respect to Flynn on Count One. Much of the remaining afternoon and the following morning was occupied with the reading to the jury of testimony which it had requested (T. 5956-70). Just after the lunch break on February 17, 1976 the partial verdict as to Petri, Hockridge and Easton on Count Two was rendered.

The fact that the jury later returned acquittals as to Easton with respect to other counts is immaterial. Count Two alleged the knowing misapplication of funds by defendants and in connection therewith relied upon the same allegations upon which the conspiracy count was based

(A. 13).* In stark contrast, the counts upon which Easton was later acquitted all rely upon either (a) the submission of a specified and allegedly false financial statement, in each instance with respect to one particular corporation, or (b) the making by Hockridge, or aiding and abetting by the other defendants, of false entries in the books of Chemical Bank concerning specific alleged interviews conducted by Hockridge on stated dates with stated persons (A. 13-26).

It is plain that the jury as a whole may have found insufficient evidence presented to establish Easton's guilt on these limited substantive counts such that no coercion was placed upon those who had earlier dissented as to the generalized counts.**

Based upon the authority previously cited, the Count Two conviction should be reversed as a product of coercion.

* Count Two consists of only two paragraphs. Paragraph 1 merely repeats the allegations of Count One. Paragraph Two alleges in conclusory language that the enumerated defendants "did unlawfully, knowingly and wilfully misapply the moneys, funds and credits of the Chemical Bank . . . " (A. 13).

** Additionally, the counts in question, with one exception, did not rely upon matter alleged as overt acts in the conspiracy count.

POINT III

THE CONVICTION MUST BE RE-
VERSED AS WELL BECAUSE NOT
THE PRODUCT OF UNANIMOUS
DECISION

A. Rule 606(b) Of The Federal
Rules Of Evidence Does Not
Apply Prior To The Jury's Discharge

As discussed in Easton's prior submission, the bar to admissibility of evidence from a juror impeaching a verdict applies only after the jury has been discharged (Br. pp. 40-41). This rule is supported not only by the learned commentators, but also by judicial decision (see authorities cited in Easton's main brief at pp. 40-41). Easton argues therefore that as the jury at bar had not been discharged when the two jurors voluntarily revealed evidence of jury misconduct to the Court, such evidence is admissible.

Appellee cites only one authority to the contrary -- the civil matter of Vizzini v. Ford Motor Co., 72 F.R.D. 132 (E.D.Pa. 1976), appeal pending, in which the Court held Rule 606(b) a bar to reception of evidence, unearthed during deliberations as to damages, indicating that the previously rendered verdict as to liability was the result of compromise. However, the decision in Vizzini wholly fails

to discuss the decision in United States v. Chereton, 309 F.2d 197 (6th Cir. 1962), cert. denied, 372 U.S. 936 (1963), holding Rule 606(b) applicable only after discharge and cannot be relied upon in a criminal matter where a defendant's constitutional right to a unanimous verdict is present and evidence exists that unanimity was lacking. cf. Cherensky v. George Washington-East Motor Lodge, 317 F. Supp. 1401 (E.D.Pa. 1970), in which the same District Court raised the question whether the no-impeachment rule would apply in criminal proceedings.

A holding that Rule 606(b) applies only after discharge would not, as suggested by other counsel before this Court at argument, require a ruling that partial verdicts are purely advisory. Rather, this Court need only hold that for the limited purpose of assessing the admissibility of a juror's testimony of misconduct, or, as here, want of unanimity, such evidence may be received at any time prior to the jury's discharge and rendition of all verdicts in the matter.

Such holding is consistent with the procedure suggested by this Court in Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2nd Cir. 1971), in the event that during

polling evidence of want of unanimity or misconduct appears. In Grace Lines, the Court indicated that given the juror's statement of disagreement with the verdict, the jury should have been sent back "under suitable instructions for further deliberating". Id., at 1032.* Permitting "impeachment" of a partial verdict by the unsolicited, voluntary statement of a juror to the Court and thereafter returning the jury to redeliberate presents none of the "evils" which Rule 606(b) was designed to minimize. First, no juror will be subject to harassment by disappointed litigants or their agents; secondly, the judicial time invested in the trial process will not be rendered meaningless, since the remedy is not a retrial of the case, but only redeliberation by the still-empanelled jury.

Finally, Easton urges that in any event Rule 606(b) is not inflexible. Rule 606(b) codified the exist-

* The procedure recommended in other circuits is in accord. E.g., Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969); United States v. Fox, 488 F.2d 1093 (5th Cir. 1973), cert. denied, 417 U.S. 948 (1974).

ing common law. Government of Virgin Islands v. Gereau, 523 F.2d 140 (3rd Cir. 1975), cert. denied, 424 U.S. 917 (1976), and authorities cited therein. This Court in Jorgensen v. York Ice Machinery Corporation, 160 F.2d 432 (2nd Cir. 1947), accepted as competent the post-discharge affidavits of jurors. The Supreme Court in United States v. Reid, 12 Hon. 361 (1851), recognized that an unwavering no-impeachment rule would disserve "the plainest principles of justice" Id., at 366.

B. The Evidence Of Want Of Unanimity Mandates Reversal On Count One

This Court's prior decisions, with which the government's brief does not deal, make it clear that where even a single juror, much less two jurors, reveals that he or she has surrendered an honest conviction, the non-unanimous verdict cannot stand. In the civil matter of Grace Lines, supra, this Court declined to reverse specifically noting:

"There is nothing to indicate that she [the juror] was surrendering a conscientious conviction." 439 F.2d at 1032.

See also, United States v. Pleva, 66 F.2d 529 (2nd Cir. 1933); United States v. Grieco, 261 F.2d 414 (2nd Cir. 1958), cert.

denied, 359 U.S. 907 (1959).

At bar, appellee relies upon the Court's finding below that neither juror surrendered an honest conviction. That finding was clearly erroneous in view of Juror Three's direct and unequivocal statement that she had done precisely that. Under prevailing authority, therefore, the judgment must be reversed.

CONCLUSION

For the reasons set forth herein and in the previous submission of defendant-appellant Easton, the judgment of conviction on Counts One and Two of the indictment should be reversed and the matter remanded for a new trial, at which trial evidence of Easton's net worth and of the failure to withhold taxes should be excluded and reception of financial statements, except Government Exhibits 2F-1, 2F-2, and 11, from the files of the Chemical Bank denied.

In ruling in connection with the no-impeachment rule we ask the Court to remember the cautionary language of the Supreme Court in United States v. Reid, 12 How. 361, at 366 (1851):

"But cases might arise in which it would be impossible to refuse them [affidavits from jurors concerning misconduct] without violating the plainest principles of justice."

and of Judge Learned Hand in Jorgensen v. York Ice Machinery Corporation, 160 F.2d 432, at 435 (2nd Cir. 1947):

"[J]udges again and again repeat the consecrated rubric [the no-impeachment rule] which has so confused the subject; it offers an easy escape from embarrassing choices."

Respectfully submitted,

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DEC 20 1977

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